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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 962

SAMUEL SPEVACK, *Petitioner*,

v.

SOLOMON A. KLEIN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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No.

SAMUEL SPEVACK, *Petitioner*,

v.

SOLOMON A. KLEIN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled action on December 1, 1965.

Opinions Below

The order and memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, are unreported and are printed as Appendices A and B hereto. The memorandum order of the Court of Appeals and the amended remittitur of that court are unreported and are printed as Appendixes C and D hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The judgment of the Court of Appeals was rendered on December 1, 1965, and, on December 13, 1965, Mr. Justice Harlan entered a stay of the order of the Appellate Division conditioned upon the filing of a petition for certiorari on or before January 24, 1966.

Questions Presented

1. Whether the disbarment of an attorney solely because of his refusal, based upon a good faith claim of the privilege against self-incrimination, to testify and to produce records before a State Judicial Inquiry is in violation of the self-incrimination clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment.

2. Whether, assuming the Fifth Amendment standard does not of itself preclude the disbarment of an attorney under such circumstances, the disbarment is nonetheless a deprivation of due process of law or equal protection of the laws under the Fourteenth Amendment.

Statutes Involved

This petition involves the Fifth and Fourteenth Amendments to the United States Constitution and Special Rule V of the Supreme Court of New York, Appellate Division, Second Department, all of which are printed in pertinent part as Appendix E hereto.

Statement of the Case

In January 1957 the Appellate Division of the Supreme Court of New York, Second Department, ordered a Judicial Inquiry into alleged unethical practices among segments of the Kings County Bar. See *Anonymous* v. *Baker*, 360

U.S. 287. For a number of years the Second Department has had special rules regulating the conduct of attorneys who practice in personal injury, property damage and certain other types of actions under contingent fee arrangements. Among other things, the rules require the filing by such attorneys of statements of retainer setting forth the details of such arrangements and the preservation for a five year period of "the pleadings, records and other papers pertaining to such action . . , and also all data and memoranda of the disposition thereof . . . [App. E]."

Petitioner has been a practicing attorney in Kings County since 1926, and he has filed numerous statements of retainer as required by the rules. On June 2, 1958, a subpoena issued calling for petitioner to testify and to produce records before the Judicial Inquiry. Petitioner's motion to quash the subpoena was denied, *Anonymous* v. *Arkwright*, 7 App. Div. 2d 874, *leave for appeal denied*, 5 N.Y. 2d 710, *cert. denied*, 359 U.S. 1009, and he appeared before the Judicial Inquiry and was sworn as a witness (R. 52).[1] However, he refused to testify or to produce the records on the ground that this might tend to incriminate him (R. 70). The Presiding Justice, after stating his "opinion" that petitioner had "a perfect right to plead that constitutional privilege," called attention to the pendency of a "test case" presenting similar issues and informed petitioner that no further proceedings would be held in his case until the final disposition of that test case (R. 71-75).

The test case, *Cohen* v. *Hurley*, 366 U.S. 117, was decided by this Court in April, 1961. In July, 1961, petitioner wrote

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[1] "R" citations refer to the transcript of hearing on June 2, 1964 before Hon. Harold McNiece, Referee, to whom the Appellate Division referred the issues raised by the petition and answer in the disciplinary proceeding involved in this case. The transcript of the proceedings in the Judicial Inquiry is printed as an exhibit at pages 9-144 of the transcript of the June 2, 1964 hearing.

the Presiding Justice of the Judicial Inquiry that, in view of the decision in the *Cohen* case, he wished to withdraw his claim of privilege (R. 102). Shortly thereafter he retained new counsel, and, after further adjournments of the hearing, he appeared before the Judicial Inquiry and was asked if he did wish to withdraw his claim of privilege, as indicated in his letter. Petitoner replied that, upon the advice of his new counsel, he continued to claim his privilege against self incrimination under the Fifth and Fourteenth Amendments, and also under Article 1, Section 6 of the Constitution of the State of New York. He also stated his reliance upon the standard of fundamental fairness under the due process clause of the Fourteenth Amendment and upon the equal protection clause of that Amendment (R. 115-18).

In response to questions by the attorney for the Judicial Inquiry as to the specific documents included in the subpoena (R. 118-19 printed as App. F), petitioner persisted in his decision "not to produce any of the records or to answer any questions in relation thereto [R. 117]." Subsequently, he asserted his rights also under the Fourth Amendment's prohibition against unreasonable searches and seizures (R. 143-44). Respondent, by direction of the Judicial Inquiry, then filed a petition seeking disciplinary action against him.

The petition filed by respondent stated that this petitioner had been guilty of misconduct in ten separate respects. Eight of the charges were allegations that he had failed to comply with certain court rules relating to filing of retainer statements, that he had filed false statements and pleadings, that he had commingled clients' funds with his own and that he had violated the canons of ethics. The ninth charge was that petitioner, apart from his refusal to testify or to produce records, had obstructed the Inquiry by obtaining repeated postponements and making or caus-

ing to be made false representations; and the tenth charge was that petitioner was guilty of misconduct in that "his refusal to answer questions and to produce the records required by said subpoena duces tecum to be produced, are in disregard and in violation of the inherent duty and obligation of [petitioner] as a member of the legal profession . . . [Petition of Solomon A. Klein to Appellate Division 4]." The petition and answer were referred to a referee for hearing, at which hearing respondent announced that he was abandoning all charges in the petition other than the ninth and tenth charges. Petitioner was again called to testify, and he again refused to answer questions under a specific claim of all the federal constitutional provisions upon which he had relied in the Judicial Inquiry (R. 164-65).

In his report, the referee found that respondent had not proven the allegations in the ninth charge. Among his specific findings were that the evidence offered no basis for a conclusion that petitioner's claim of privilege "was invoked more extensively than reasonably required to protect [petitioner] against incrimination" and that the Inquiry was neither prejudiced nor misled by petitioner's July 1961 letter indicating his intention to withdraw his claim of privilege (Ref. Rept. 10, 19-20). As to the tenth charge, the referee found that petitioner did refuse to testify and to produce records under constitutional privileges based upon the Fourth, Fifth, and Fourteenth Amendments and upon relevant state constitutional provisions. He made no finding as to whether petitioner's refusal to testify and to produce records was in violation of his duties as an attorney, since that question was "inextricably bound up with the constitutional issues raised by [petitioner's] affirmative defense, and resolution of those issues is not within my province [Ref. Rept. 22]."

Respondent moved in the Appellate Division for con-

firmation of the referee's report and for the imposition of discipline against petitioner, and the Appellate Division entered a judgment disbarring petitioner. Finding the sole issue to be petitioner's refusal to testify and produce records before the Inquiry, the court, relying solely upon the *Cohen* case, held that an attorney has "an absolute right to invoke his constitutional privilege against self-incrimination" but that when he does so "he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar [App. B, p. 31]." The Appellate Division in no sense questioned either the applicability of the Fifth Amendment to petitioner's refusal to testify and to produce records or his good faith in asserting that privilege, but it held that he must make an election between incrimination and disbarment.

The Court of Appeals affirmed the judgment of the Appellate Division in a memorandum order without opinion, on the authority of *Cohen* "and on the further ground that the Fifth Amendment privilege does not apply to a demand" for production of records "required by law to be kept" by an attorney (App. C). Judge Fuld concurred, stating that while he adhered to his views in dissent in *Cohen*, see 166 N.E. 2d 672, 677-80, he deemed himself bound by that case.

Reasons for Granting the Writ

Petitioner's primary argument is that the court below erred in relying upon *Cohen* v. *Hurley*, *supra*, and that the governing decisions are *Malloy* v. *Hogan*, 378 U.S. 1, and other of this Court's decisions applying the Fifth Amend-

ment. Under those decisions, the State is precluded from requiring petitioner to elect between asserting the privilege and retaining the right to practice in his profession. If, however, the Fifth Amendment itself is thought not to preclude the State action here, then it is our alternative contention that the broader standards of due process and equal protection were breached by the State. And, finally, we show that the decision below cannot be supported by the Court of Appeals' partial reliance upon the "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1.

1. *The decision below is in conflict with this Court's decision in* Malloy *v.* Hogan, *378 U.S. 1, and other cases applying the Fifth Amendment.* The opinion of the Appellate Division relied solely upon this Court's decision in *Cohen* v. *Hurley, supra,* and the Court of Appeals also relied upon that case. In *Cohen,* this Court, over the dissents of four of its members, upheld the disbarment of an attorney for his refusal to testify and to produce records in the same Judicial Inquiry involved in the instant case. The Court held that it was neither arbitrary nor discriminatory for New York to disbar an attorney who, by claiming his state constitutional privilege against self-incrimination, failed to cooperate adequately with the Inquiry. The Court passed only upon petitioner's question of fundamental fairness under the Fourteenth Amendment, holding that "a State has great leeway in defining the reach of its own privilege against self-incrimination . . . ." 366 U.S., at 125. The Court also held that petitioner had not preserved any Fifth Amendment claim and that, in any event, no Fifth Amendment privilege was applicable in a State proceeding.[2]

[2] Whether the State of New York may impose certain sanctions, pursuant to Article I, Section 6 of its Constitution, upon persons who invoke the privilege against self-incrimination of the Fifth Amendment, in the light of the applicability to the States of that Amendment's self-incrimination clause, is now before this Court in *Stevens* v. *Marks*, No. 210, and

In this case, however, petitioner has relied specifically upon the Fifth Amendment's protection at all stages, and he contends here, as he contended in the courts below, that the courts' reliance upon the standard of *Cohen* is in conflict with this Court's decision in *Malloy* v. *Hogan*, 378 U.S. 1. The *Cohen* premise that the Fifth Amendment privilege is not applicable against state action was rejected in *Malloy*, which held that "the Fourteenth Amendment secures against state invasion *the same privilege* that the Fifth Amendment guarantees against federal infringement. . . ." *Id.*, at 8. [Emphasis added.] The Court in *Malloy* specifically rejected the suggestion that "the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding," holding that "[i]f *Cohen* v. *Hurley* . . . and *Adamson* v. *California* . . . suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the *Twining* view of the privilege has been eroded." *Id.*, at 10-11.

The federal standard, which the courts below have failed to apply, is clear from *Malloy*—the State may not infringe "the right of a person to remain silent unless he chooses to

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Stevens v. *McCloskey*, No. 290, cert. granted, 382 U.S. 809 (Oct. 12, 1965). Those cases involve the dismissal of a policeman for his refusal to sign a waiver of immunity in connection with prospective testimony before a grand jury. Petitioner contends that, if the Court concludes that the Fifth Amendment precludes Stevens' dismissal for his insistence upon retaining his privilege against self-incrimination, *a fortiori* petitioner must prevail on question 1 in this petition. Should the Court conclude that Stevens' dismissal is not precluded by the Fifth Amendment, however, that decision would not be dispositive of this case. See, *e.g.*, *In re Holland*, 36 N.E. 2d 543 (Ill.), which held that an attorney could not be disciplined for refusing to cooperate in an investigation by claiming his state privilege against self-incrimination. The court distinguished cases upholding the discharge of policemen for claiming the privilege. See also Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. Chi. L. Rev. 472, 498-508 (1957).

speak in the unfettered exercise of his own free will and to suffer no penalty . . . for such silence." Id., at 8. Last Term the Court reaffirmed that standard in *Griffin* v. *California,* 380 U.S. 609, 614, holding that comment by a prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." That broad protection of the federal privilege has been recognized at least since *Boyd* v. *United States,* 116 U.S. 616, 634-5, and has been reaffirmed repeatedly by this Court. See, *e.g., Counselman* v. *Hitchcock,* 142 U.S. 547; *Hoffman* v. *United States,* 341 U.S. 479.

In *Griffin* and *Boyd,* as in this case, the government sought to impose an election, an alternative to relinquishment of the privilege. The election in *Griffin* was to suffer the consequences of comment on the refusal to testify; in *Boyd* it was the forfeiture of thirty-five cases of plate glass in a forfeiture proceeding; here it is the deprival of the right to practice a profession in which petitioner has engaged for almost forty years. That election is no more permissible here than in *Griffin* and *Boyd,* since this Court has held that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Ex Parte Garland,* 4 Wall. 333, 377; see *Cummings* v. *Missouri,* 4 Wall. 277, 322.

Nor can it fairly be disputed that petitioner's disbarment was based upon invocation of his privilege under the Fifth Amendment. Both the opinion of the Appellate Division and the referee's report establish that the charge of petitioner's purported failure to cooperate with the Judicial Inquiry was sustained only as to his refusal to testify and to produce records, and they also establish that the refusal was based upon a good faith claim of his Fifth Amendment

privilege. Indeed, the referee refrained from making a finding as to whether petitioner's refusal was a violation of his duties as an attorney on the ground that the question was "inextricably bound up with the constitutional issues raised" by him. Faced with this Court's decision in *Slochower* v. *Board of Education*, 350 U.S. 551, 558, that a statute which "operates to discharge every city employee who invokes the Fifth Amendment" is unconstitutional, the Appellate Division stated that its order was not grounded upon petitioner's invocation of the privilege but upon his refusal to cooperate with the Judicial Inquiry. The opinion, however, unequivocally lays down an inflexible rule which admits of no exception. If an attorney "elects to invoke his constitutional privilege against self-incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar [App. B., p. 32]." It is evident, therefore, that the distinction asserted by the court below is solely verbal and not substantial. For this reason whether the disbarment is said to be based upon a failure to cooperate or upon the plea of self-incrimination the "legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *Cummings* v. *Missouri*, *supra*, at 325.[3]

The importance of the application of the federal standard of the Fifth Amendment's self-incrimination privilege in

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[3] *Nelson* v. *Los Angeles County*, 362 U.S. 1, which held that it was not a violation of due process for a state employee to be discharged for insubordination in failing to comply with his employer's order to answer questions by a federal tribunal, is not to the contrary. First, the question of whether the discharge was in violation of the self-incrimination clause of the Fifth Amendment was not presented. Moreover, as shown below, the due process issue was decided upon the basis of a premise that is no longer valid.

disciplinary proceedings against attorneys is apparent from the conflicting decisions of state courts concerning attorneys' claims of the privilege on either state or federal constitutional grounds.[4] Compare *In Re The Integration Rule of the Florida Bar*, 103 So. 2d 873, 875 (Fla.) ("This court is committed to the doctrine that claiming the privilege . . . may not be considered a breach of duty to the court."); *Sheiner* v. *State*, 82 So. 2d 657 (Fla.); *In re Holland*, 36 N.E. 2d 543 (Ill.); and *In re Grae*, 26 N.E. 2d 963 (N.Y.); with *In re Fenn*, 128 S.W. 2d 657 (Mo.); and *Johnson* v. *State Bar of California*, 52 P. 2d 928 (Cal.). See generally, Note, The Privilege to Practice Law versus the Fifth Amendment Privilege to Remain Silent, 56 N.W.U.L. Rev. 644 (1961).

2. *The disbarment of petitioner for his refusal to relinquish his privilege against self-incrimination is arbitrary and discriminatory state action in violation of the Fourteenth Amendment.* Petitioner contends that the specific standard of the Fifth Amendment, as applied to the states in the Fourteenth Amendment, precludes the action at issue in this case. But even if the State's action in disbarring petitioner is thought for some reason not to fall within the specific prohibition of the Fifth Amendment, that action offends the more generalized standards of the due process and equal protection clauses of the Fourteenth Amendment, which prohibit arbitrary or discriminatory action resulting either in the deprivation of one's right to practice a profession or in his dismissal from public

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[4] Petitioner has found no federal court decisions considering the precise issue in the light of the Fifth Amendment's self-incrimination clause. But, in *Ex Parte Wall*, 107 U.S. 265, 271, upholding the disbarment of an attorney from a federal court upon proof of participation in a lynching against an assertion of deprivation of Fifth Amendment due process, the Court thought it worthy of note that "the petitioner was not required to criminate himself by answering under oath."

employment. *Konigsberg* v. *State Bar*, 353 U.S. 252; *Schware* v. *Board of Law Examiners*, 353 U.S. 232; *Slochower* v. *Board of Education, supra; Weiman* v. *Updegraff*, 344 U.S. 183.

Preliminarily, it is important to recognize that this Court's decision in *Cohen* v. *Hurley, supra*, and its analogous decisions in *Nelson* v. *Los Angeles County*, 362 U.S. 1; *Lerner* v. *Casey*, 357 U.S. 468; and *Beilan* v. *Board of Education*, 357 U.S. 399, are not controlling on this issue in light of *Malloy* v. *Hogan, supra*. In both *Cohen*, 366 U.S., at 118, and *Lerner*, 357 U.S., at 478-9, the Court held that there could be no reliance upon the Fifth Amendment privilege in the state proceedings there involved. In *Beilan* the Pennsylvania Supreme Court's determination that the dismissal was entirely unrelated to Beilan's claim of privilege was accepted by this Court, 357 U.S., at 402, n. 3. *Nelson*, on the other hand, did involve state sanctions that resulted from the invocation of the Fifth Amendment. But *Nelson* was decided at a time when it was not considered arbitrary for a state even to compel testimony, in the face of an assertion that it would incriminate the claimant under federal law. *Knapp* v. *Schweitzer*, 357 U.S. 371.[5] *A fortiori* it was not then considered arbitrary for a state to discharge an employee who claimed his federal privilege against self-incrimination.

In sum, if the case is to be tested by the fundamental

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[5] The premise of *Knapp*, which was decided on the same day as *Beilan* and *Lerner* and which was equally applicable to those cases, was that "[i]t is plain that the [Fifth] Amendment can no more be thought of as restricting action by the States than as restricting the conduct of private citizens. The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government. . . ." 357 U.S., at 380. This Court's subsequent rejection of that premise, which destroyed the validity of *Knapp*, see *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, is thus no less destructive of *Lerner* and *Beilan*, as well as *Nelson*.

fairness standard of the Fourteenth Amendment, *Malloy* has introduced an important new element: the obligation of the State under the Fourteenth Amendment to preserve inviolate a person's claim of the Fifth Amendment.[6] The question, then, is whether the action of the State in forcing petitioner to choose between his livelihood and the privilege is so offensive to the community's sense of fair play as to be arbitrary or discriminatory under the due process and equal protection clauses.

There is no denying the fact that the state has imposed a grievously heavy penalty upon petitioner's claim of his Constitutional right. In whatever verbal formula the State's motive may be couched, the inescapable fact is that petitioner's claim of his privilege was the act that produced the disbarment. It is also perfectly obvious that the State's action will have an inhibiting effect on the freedom of persons to claim the privilege. And it is surely unnecessary to emphasize the vital importance of the Fifth Amendment in our scheme of Constitutional government. See *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55.

Petitioner in no sense disputes that the State has a legitimate interest in maintaining high standards of competence and character among the members of the legal profession. At the same time, it is relevant to the Fourteenth Amend-

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[6] The Court has held that it is not arbitrary for a state to deny admission to its bar to one who, by asserting a privilege under the First Amendment not to answer certain questions, was said to have thwarted a full investigation into the qualifications which he was required to prove in order to gain admission. *Konigsberg* v. *State Bar*, 366 U.S. 36. In so deciding, the Court rejected the petitioner's contention that his First Amendment right was absolute and held that it was outweighed by the State's interest. *Id.* at 52. Since that decision was rendered under the premise that "the protections of the First Amendment, *unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment*, do not afford a witness the right to resist inquiry in all circumstances," *Barenblatt* v. *United States*, 360 U.S. 109, 126 [Emphasis added], the *Konigsberg* case did not present the issue involved here.

ment question that this interest of the State is not of pre-eminent importance. It is not of the same order, for example, as society's interest in self preservation in a time of grave national emergency. Indeed, the interest arguably is of no greater importance than the State's interest in convicting the guilty—an interest that by the explicit command of the Constitution is made subordinate to the Fifth Amendment.

But granting the legitimacy of the State's interest, the critical question remains whether what the State has done is reasonably necessary to preserve the integrity of the bar, since the State may not, by characterizing the practice of a law as a "privilege" rather than a right, withhold or discontinue the exercise of that "privilege" without meeting the standards of the Fourteenth Amendment, *Schware* v. *Board of Law Examiners, supra,* at 239, n. 5, nor can it "in the guise of prohibiting professional misconduct, ignore constitutional rights." *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 438. See *Railroad Trainmen* v. *Virginia Bar,* 377 U.S. 1. See generally Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

Plainly, no such reasonable relationship has been established. With respect to this case, petitioner's pleadings in actions before the courts and the statements of retainer that he filed disclosed the identity of all of his clients, so that the state had but to take the time required for careful investigation in order to establish whether a case against him could be made. And beyond the facts of this case, petitioner suggests that there is nothing in reason or experience to indicate that the maintenance of high standards of conduct by attorneys will be prejudiced in any material way if they, as well as other citizens, are permitted to invoke their Fifth Amendment rights without fear of loss of livelihood and reputation. Perhaps the

development of independent evidence is not as efficient as convicting a man out of his own mouth or disbarring him if he refuses to "cooperate," but the Bill of Rights ordains that where its protections conflict with the efficiency of a system of law enforcement, the fault lies in the system and not in the Constitution. *Escobedo* v. *Illinois*, 378 U.S. 478, 490.

Moreover, the procedure employed here by the State does not merely denigrate an important constitutional right unnecessarily. It is fraught with the same danger that is characteristic of all devices which undermine the guarantees of the Fourth, Fifth and Sixth Amendments: it is bound to punish the innocent along with the guilty. This Court has emphatically "scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." *Slochower* v. *Board of Education, supra*, at 557.[7]

Finally, the arbitrary and discriminatory nature of the State's position is particularly apparent in its application to the Judicial Inquiry in which petitioner's testimony and production of records were sought. While, pursuant to a specific request, petitioner was permitted to have counsel during his questioning (R. 44-45), but compare *Anonymous* v. *Baker*, 360 U.S. 287, the Inquiry was "a secret investigation (R. 31, statement of Presiding Justice.)" No specific charges were made against petitioner, and he had no right

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[7] The investigation, through questioning of third parties, into the charges against petitioner which were withdrawn by respondent, was not made part of the record, but respondent will agree that such an investigation was made. The record shows only that the charges were made, petitioner denied them, and respondent withdrew them. See Ref. Rept. 3; R. 8.

of cross-examination. See *Id.*, at 292-3.[8] It is in just this sort of proceeding that the Court has recognized the privilege to be most valuable. See *Grunewald* v. *United States*, 353 U.S. 391, 422-23. To be sure, the State recognizes petitioner's absolute right—as a citizen—to claim the privilege, but only at an impermissibly high price—the forfeiture of the right to practice his profession.[9]

3. *The State may not deprive petitioner of the Fifth Amendment privilege against compulsory production of his*

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[8] In the *Baker* case, the Court upheld the contempt convictions of two private investigators who refused to testify before the Judicial Inquiry because they were not permitted to have their counsel in the hearing room during the interrogation. In holding the secret interrogation without presence of counsel consistent with due process of law, the Court noted the availability to the petitioners of the state privilege against self-incrimination, and quoted the following from the interim report of the Presiding Justice:

> " 'We have been scrupulous in apprising all attorneys of the stated purposes of the Inquiry as laid down by the Appellate Division, and witnesses, whenever required, have been advised of their constitutional rights.
>
> 'As many as 30 persons sworn as witnesses before the Additional Special Term have, as is their unquestioned right, invoked their constitutional privilege against self-incrimination, including 11 attorneys and 10 doctors. Faced with this roadblock, Counsel for the Inquiry has been forced to develop and to present independent evidence of the facts.' " 360 U.S., at 296, n. 11.

Presumably in an effort to lower if not remove the roadblock, so that the necessity of independent evidence would not be so pressing, the *Cohen* "test case" was developed.

[9] The position of the State is no more supported by history than by reason. Petitioner has found only one instance in which this Court was faced with the compatibility of the Fifth Amendment and the duty of its officers. In *Marbury* v. *Madison*, 1 Cranch 137, Attorney General Levi Lincoln was summoned before the Court to testify as to acts performed when he was Secretary of State. In response to his objection to answering certain questions, the Court stated that he was not "obliged to state anything which would criminate himself. . . ." *Id.*, at 144. The history of New York's own privilege, prior to *Cohen*, is similarly devoid of any support. See *In Re Cohen*, 166 N.E. 2d 672, 677-680 (dissenting opinion of Fuld, J.), *aff'd sub nom. Cohen* v. *Hurley*, *supra*. Cf. cases cited *supra*, p. 11.

financial records and documents by a requirement that attorneys preserve records of that type. The Appellate Division explicitly recognized that petitioner had "an absolute right to invoke his constitutional privilege against self-incrimination and to refuse" to testify and to produce the records for which the subpoena called, but held that he could nonetheless be disbarred for exercising that right. In its memorandum order, however, the Court of Appeals relied not only upon the *Cohen* case but also "on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (*Davis* v. *United States*, 328 U.S. 482; *Shapiro* v. *United States*, 335 U.S. 1) [App. C]." Thus, the Court of Appeals reversed the Appellate Division's holding that the privilege was applicable to petitioner's refusal to produce records,[10] although it agreed with the holding that the privilege applied to his refusal to testify.

Assuming arguendo that the Fifth Amendment privilege does not, by virtue of the so-called "required records exception," preclude the State from compelling petitioner to produce his financial records and documents, that exception would not remove the privilege to refuse to testify, either in general or with reference to the required records. *Shapiro* v. *United States*, 335 U.S. 1, 27; see *Curcio* v. *United States*, 354 U.S. 118. The respondent's petition for disciplinary proceedings, the referee's report, the Appellate Division opinion, and the order and amended remittitur of the Court of Appeals establish that petitioner's disbarment was based upon both the refusal to answer questions

[10] No such suggestion appears in the court's opinion in the *Cohen* case. 166 N.E. 2d 672. While the focus of that case was on Cohen's refusal to testify, he was also called upon to produce records and the petition for disciplinary action was based upon his refusal both to produce records and to answer questions. *Cohen* v. *Hurley*, 366 U.S. 117, 121.

and the refusal to produce records. Therefore, if the Court accepts petitioner's argument to the extent that petitioner could not constitutionally be disbarred for his refusal to testify, the fact that the disbarment order was also based in some inestimable degree upon an unprivileged refusal to produce records would not salvage that order, see *Jackson* v. *Denno*, 378 U.S. 368; *Fahy* v. *Connecticut*, 375 U.S. 85, and the Court thus would not have to reach the question whether the records could be withheld under a claim of privilege. Should the Court believe it appropriate to reach that question, however, petitioner contends that the doctrine of *Shapiro* should be reconsidered and rejected in light of subsequent decisions of this Court, or, in the alternative, that the doctrine, whatever its validity in the context of *Shapiro*, is not applicable to the instant case.

a. *This Court's decision in* Shapiro *v.* United States *is no longer valid in light of its subsequent decision in* Albertson *v.* S.A.C.B., — U.S. —, *and of other decisions applying the Fifth Amendment.* In the *Shapiro* case the Court held that the Fifth Amendment privilege did not apply to sales records required to be kept by food licensees under wartime regulations of the Office of Price Administration, since those records lost their character as private papers and acquired "'public aspects.'" 335 U.S., at 34. The case involved a fruit and vegetable wholesaler licensed under the Emergency Price Control Act, 56 Stat. 23, who was tried on charges of having made sales in violation of OPA regulations. He contended that because he had produced, under subpoena, sales records required to be kept by him under OPA regulations and had been assured that such production conferred upon him the immunity which flowed from the immunity provisions of the Emergency Price Control Act, he could not be prosecuted for violations disclosed by such records. The Court, in a long opinion devoted to the construction of the immunity provision of the Act, rejected the

petitioner's contention that its scope was broader than the boundaries of the Fifth Amendment and held that no immunity applied to the petitioner by virtue of his record production. Noting that petitioner had not duly raised the question, the Court then held that the Act was constitutional as thus construed. The Court assumed that "there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper," 335 U.S., at 32, but held that the bounds were not exceeded in that case.

The principal authorities cited for that conclusion were *Wilson* v. *United States*, 221 U.S. 361, which held that the president of a corporation had no Fifth Amendment privilege to resist the production of corporate rather than personal records merely because they were in his custody, and *Davis* v. *United States*, 328 U.S. 582, which held that gasoline ration coupons issued by the OPA under regulations which provided that such coupons did not become private property but remained the property of the government were not protected by the Fourth and Fifth Amendments to the same degree as are private papers. Thus *Shapiro* used the premise that documents belonging to a third party do not become "personal," and as such protected by the privilege solely because they are in the custody of the individual claiming the privilege, to reach the conclusion that documents admittedly personal can be deprived of that character (and thus of the Fifth Amendment's protection) through a federal statute or regulation requiring that the documents be kept.[11]

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[11] The Court in *Shapiro* quoted a dictum from *Wilson* as quoted in *Davis* to the effect that the privilege does not apply to "'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regula-

The rationale of *Shapiro*, which is not that the Fifth Amendment must be balanced against countervailing governmental interests but rather that the privilege simply does not apply because of waiver or because required records lose their character as private papers, has been rejected by most commentators, who have urged re-examination of the doctrine. See, *e.g.*, Note, Required Information and the Privilege Against Self-Incrimination, 65 Colum. L. Rev. 681 (1965); Note, Constitutional Limits on the Admissibility in the Federal Courts of Evidence Obtained from Required Records, 68 Harv. L. Rev. 340 (1954); Meltzer, Required Records, The McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

The required records doctrine of the *Shapiro* case should be reconsidered and rejected for three reasons: First, it is an unwarranted limitation upon the scope of the privilege as earlier applied in *Boyd* v. *United States*, *supra*, which held unconstitutional under the Fifth Amendment (and also the Fourth) a statute calling for the compulsory production, in suits for forfeiture, of business books, invoices or papers of the defendant or claimant.[12] Under the *Shapiro* doctrine, except as read in its narrowest sense, see *Curcio* v. *United States*, *infra* note 15, the importer-claimant's invoice in *Boyd* was a required record not within the protection of

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tion,'" 335 U.S., at 33, but that language cannot be divorced from the context of the questions with which the Court was faced in *Wilson* and *Davis*. See *Id.*, at 56-66 (dissenting opinion of Frankfurter, J.).

[12] Section 5 of an Act to amend the customs-revenue laws and to repeal moieties, 18 Stat. 187:

> "That in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the Attorney representing the government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion . . . and thereupon the court . . . may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court. . . ."

the Fifth Amendment.[13] Second, *Shapiro* is inconsistent with subsequent injunctions of the Court that the privilege "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman* v. *United States*, 341 U.S. 479, 486; see *Quinn* v. *United States*, 349 U.S. 155, 162. Third, *Shapiro* is inconsistent with the Court's decision this Term in *Albertson* v. *S.A.C.B.*, — U.S. — (Nov. 15, 1965).

In the *Albertson* case, the Court held that sections 8(a) and (c) of the Subversive Activities Control Act of 1950, 50 U.S.C. 787(a) and (c), and orders under those sections requiring petitioners to register as members of the Communist Party by completing and filing registration statements, were violative of the self-incrimination clause of the Fifth Amendment. The Court cited cases in which it had held that witnesses could not be compelled to testify as to Communist party membership or association, and held that, "if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes. Cf. *People of New York* v. *Reardon*, 197 N.Y. 236, 243-244, 90 N.E. 829, 832." — U.S., at —.[14] That holding in itself is inconsistent with *Shapiro*, which established just such a constitutional difference between compelling oral testimony and compelling documentary evidence. 335 U.S., at 27. If the privilege

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[13] Sections 9 and 10 of the same Act under which the government compelled production of the invoice in *Boyd*, prohibited the entry into the United States of any foreign goods valued in excess of $100 "without the production of an invoice thereof as required by law" or an affidavit showing why such invoice could not be produced and showing the actual cost or foreign market value of the goods. 18 Stat. 188.

[14] In *Reardon*, the New York Court of Appeals, relying in part on *Boyd* v. *United States*, struck down, under the State privilege against self-incrimination, a statute which provided that "the [State] Comptroller shall have the right and it shall be his duty to examine the books and papers of any person . . ., and memoranda of [stock] transfers shall remain accessible for such inspection for three months from their respective dates." 90 N.E., at 831.

is violated by a requirement that an individual prepare and file a registration statement with the government, it is violated equally by a requirement that an individual keep records which must be surrendered upon the government's call. Surely the *Albertson* case means more than that the statute must be amended to require that records be kept of the information called for by the registration form.

Admittedly there are factual differences between this case and *Albertson*, notably the fact that the general probabilities of incrimination from filing registration statements under the 1950 Act are substantially greater than from keeping and producing records under the Appellate Division rule at issue here. But the significance of that distinction is not determinative since the privilege depends only upon the tendency and not the certainty of incrimination, *Counselman* v. *Hitchcock, supra; Quinn* v. *United States, supra;* and petitioner finds no other significant distinctions which detract from the following conclusion of a commentator shortly after the 1950 Act was passed:

> "Accordingly, unless the Court . . . upholds the registration provisions [of the 1950 Act] as compatible with the privilege, it must repudiate the *Shapiro* doctrine, or limit it in some fashion which will suggest the Court's appraisal of the substantive policy implemented by informational requirements." Meltzer, Required Records, the McCarran Act, and the Privilege Against Self-Incrimination, 18 U. Chi. L. Rev. 687, 727 (1951).

Regardless of whether the impact of *Albertson* upon *Shapiro* is as clear as we believe, the question of the continued vitality of *Shapiro* in light of *Albertson* is surely a question deserving consideration by this Court. The Court has not, since *Shapiro*, applied its doctrine or explained the scope of the limitations upon that doctrine which the

Court acknowledged in that very case. *Cf. United States* v. *Kahriger*, 345 U.S. 22. In view of the continuous restriction of the area of activity that is beyond the reach of the government's regulatory powers, which correspondingly increases the potential of the *Shapiro* doctrine as a vehicle for draining the Fifth Amendment of a substantial part of its force, the uncertainty as to the reach of *Shapiro* should be resolved.

That there is much uncertainty as to the reach of *Shapiro* is evidenced by the conflicting interpretations given that case by the Courts of Appeals and District Courts. In *Beard* v. *United States*, 222 F.2d 84, 93 (4th Cir.), *cert. denied*, 350 U.S. 846, the court interpreted *Shapiro* as holding "that all records which Congress in the exercise of its constitutional powers may require individuals to keep in the conduct of their affairs relating to the public interest become public records in that they fall outside the constitutional protection of the Fifth Amendment." In *United States* v. *Remolif*, 227 F. Supp. 420, 423 (D. Nev.), however, the court limited *Shapiro* to its "exact holding" concerning "books and records required by law to be kept and maintained under the Emergency Price Control Act," holding that it could not be interpreted "as abolishing the protection of the Fifth Amendment with respect to a person's books and records merely because one or more of innumerable state and federal laws may require records of that type to be kept."[15] For further examples of the conflict

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[15] In *Curcio* v. *United States*, 354 U.S. 118, the Court held that a union official could not be compelled, upon a claim of the Fifth Amendment privilege, to answer questions relating to union records in his custody which he had refused to produce. In citing the statement in *Shapiro* that "'all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege,'" the Court in *Curcio* characterized *Shapiro* as holding "that the privilege against self-incrimination did not apply to records required to be kept by food licensees under wartime OPA regulations. . . ." *Id.*, at 124.

in interpretation and application of the *Shapiro* doctrine, compare *United States* v. *Clancy*, 276 F. 2d 617, 630-1 (7th Cir.), reversed on other grounds *sub nom. Clancy* v. *United States*, 365 U.S. 312, with *Russell* v. *United States*, 306 F. 2d 402, 410-411 (9th Cir.), and *United States* v. *Ansani*, 138 F. Supp. 451 (N.D. Ill.).

b. *The* Shapiro *doctrine is inapplicable to the record requirement in this case.* Assuming that the *Shapiro* doctrine is not wholly invalid, the factors discussed above show at least that it must be limited so that the power to compel production of records against a claim of privilege is narrower than the full scope of Congressional and State power to require the keeping of records.[16] Under any reasonable limitations, the doctrine would not be applicable in this case. One limitation which has been suggested is that the privilege should be inapplicable only where evidence from the records involved is clearly essential to the implementation of a regulatory program and where there are no other available means of enforcement which are less repugnant than requiring a serious inroad into the scope of the privilege. See Note, Constitutional Limits Upon the Admissibility in the Federal Courts of Evidence from Required Records, 68 Harv. L. Rev. 340, 345 (1954); Comment, 9 Stan. L. Rev. 375 (1957). This test, while it has not been

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[16] Even if the *Shapiro* doctrine is rejected entirely, any possible impairment of the government's enforcement of regulatory programs would be relatively slight, since documents could be withheld only by natural persons who chose to claim the privilege. There would be no effect upon the regulation of corporations, *Wilson* v. *United States*, *supra*, or unincorporated associations such as partnerships, *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir.), *cert. denied*, 374 U.S. 807, or labor unions, at least to the extent that such an association "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *United States* v. *White*, 322 U.S. 694, 701.

met by the State in this case, would still seem to be at odds with the Court's recognition that the Fifth Amendment privilege is not to be balanced against competing State interests. See *Barenblatt* v. *United States*, 360 U.S. 109, 126.

Another limitation of the doctrine (which, in petitioner's view, would still be an unwarranted limitation upon the privilege) may be found in the Court's reliance in *Shapiro* upon the fact that the sales record required to be kept and produced by the petitioner "recorded" a transaction in which he "could lawfully engage solely by virtue of the license granted him under the statute." 335 U.S., at 35. Under this analysis only documents which served this recording function would lose the protection of the privilege.

No such records are involved here. The transactions in which petitioner engaged by virtue of his license were fully recorded in the pleadings filed in the Appellate Division and other courts and in the statements of retainer which he filed and which are not in issue here. If respondent sought to enforce any ethical or legal requirements against petitioner, he had ready access to the information necessary to do so. But the records called for in the subpoena directed to petitioner, which respondent apparently contends are required to be kept under Special Rule 5 of the Appellate Division, are of a completely different character, see App. F, including such items as his check books, savings account pass books, records of all loans made, and state and federal tax returns. Petitioner submits that if indeed Rule 5 embraces the documents called for in the subpoena directed to him,[17] "[i]t is impossible to adopt any normal

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[17] Under any normal reading of the subpoena the documents which petitioner was directed to produce were not those required to be kept under Rule 5, which was amended and renumbered as Rule IV(6), in 1961, see Civil Practice Annual 9-26 (1965), except to the extent that, through the great breadth of the subpoena, some few required records may have

conception of private books and papers which would not include those . . . enumerated," *People* v. *Reardon, supra,*, at 831, and the Rule is therefore not within the scope of *Shapiro* and does not remove the Fifth Amendment privilege.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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been included. The record shows no suggestions in the Judicial Inquiry or in the hearing in the Appellate Division to the effect that petitioner should produce only the records covered by Rule 5 or even that petitioner's privilege was removed partially or completely by reason of Rule 5. To the contrary, both the Presiding Justice in the Judicial Inquiry and the Appellate Division determined that petitioner's privilege was fully applicable to his refusal to testify and to produce the documents. Petitioner will argue, if certiorari is granted, that it would be a deprivation of due process to apply the *Shapiro* doctrine in these circumstances, even if that doctrine is given the broadest possible application.

APPENDIX A

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Judicial Department at the Borough of Brooklyn, on the 19th day of July, 1965.

Present—Hon. MARCUS G. CHRIST, Acting Presiding Justice.
ARTHUR D. BRENNAN,
L. BARRON HILL,
JAMES D. HOPKINS,
A. DAVID BENJAMIN, Justices.

In the Matter of SAMUEL SPEVACK, an attorney

SOLOMON A. KLEIN, *Petitioner;*

SAMUEL SPEVACK, *Respondent.*

Order of Disbarment

A proceeding having been instituted in this court upon the petition of Solomon A. Klein, verified the 8th day of July, 1963, in respect to Samuel Spevack, an attorney and counselor at law admitted in this department on March 3, 1926, petitioning for an order directing that the respondent Samuel Spevack, as an attorney and counselor at law, be disciplined upon the charges set forth in said petition, and why such other or further action upon the charges embodied in said petition, as justice may require, should not be had, and for such other and further relief as may be just and proper, and the respondent having filed an answer, and this court by order dated September 23, 1963 having referred the issues raised by the petition and the answer to Harold F. McNiece, Esq., as referee, for hearing and for a report setting forth his findings upon the issues, and the Referee, after holding an extensive hearing at which testimony was taken, having filed his report dated October 21, 1964 with this court on said date, together with the testimony and exhibits, and the petitioner having moved to confirm the Referee's report and for the imposition of an

appropriate measure of discipline upon the respondent, by notice of motion, dated April 29, 1965.

Now on reading and filing said notice of motion, petition, answer, affidavit of Solomon A. Klein and memorandum of petitioner in support of motion to confirm report, affidavit of Bernard Shatzkin and memoranda of respondent in opposition to petitioner's motion, the report of the Referee, the testimony and exhibits, and all the papers filed herein, and the said motion having been submitted by Mr. Solomon A. Klein, petitioner appearing in person and submitted by Messrs. Shatzkin and Cooper of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered that the petitioner's motion to confirm the Referee's report be and the same hereby is granted; and it is further

Ordered that the report of the Referee and the Referee's findings be and the same hereby are confirmed; and it is further

Ordered that on the basis of the Referee's unchallenged finding that respondent refused to testify and to produce his records the respondent Samuel Spevack be and he hereby is disbarred from practice as an attorney and counselor at law effective October 1, 1965; and it is further

Ordered that the name of Samuel Spevack be and the same hereby is struck from the role of attorneys and counselors at law in the State of New York effective October 1, 1965; and it is further

Ordered that the said Samuel Spevack be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, and he is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority or to give to another an opinion as to the law of its application or any advice in relation thereto effective October 1, 1965.

Enter:

JOHN J. CALLAHAN,
Clerk.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT,

Clerk's Office, Borough of Brooklyn, N.Y.

I, JOHN J. CALLAHAN, Clerk of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said Court upon the Appeal in the above entitled action or proceeding, and entered in my office on the 19th day of July, 1965.

[SEAL] IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 22nd day of July, 1965.

— /s/ JOHN J. CALLAHAN,
Clerk.

APPENDIX B

Opinion of the Supreme Court of New York, Appellate Division, Second Department

No. 1209.

In the Matter of Samuel Spevack, an attorney.

Solomon A. Klein, *petitioner;*

Samuel Spevack, *respondent.*

This is a proceeding to discipline respondent, an attorney at law, for professional misconduct. The issues of fact were referred to a Referee for a hearing and for a report setting forth his findings upon the issues. The Referee, after holding an extensive hearing, has filed his report setting forth findings which are partly in favor of the respondent and partly adverse to him. The petitioner now moves to confirm the Referee's report and for the imposition of an appropriate measure of discipline upon respondent.

While originally ten charges were made against respondent, only one survives for our consideration; further reference to this one surviving charge will be made below. As to eight of the charges, the petitioner offered no proof and has in effect abandoned them. As to the ninth charge, the Referee found that petitioner had failed to sustain the burden of proof and that respondent was not guilty.

The remaining tenth charge—the sole charge now in issue—is that respondent refused to honor a subpoena duces tecum duly served upon him, in that he had refused to produce his financial records and had refused to testify before the justice presiding at said Judicial Inquiry; and that such refusal constituted a breach of his inherent duty as an attorney and counselor at law to divulge to the court all pertinent information bearing upon his character and fitness and upon his conduct and practices as a lawyer. The learned Referee has found, and the respondent does not deny that, while at times he may have wavered in his refusal, his refusal finally became intransigent and absolute.

Respondent's sole defense is that his refusal was based on the ground that the production of his records and his testimony would tend to incriminate him; that he was entitled to rely on the relevant state and federal constitutional provisions protecting him against self-incrimination; and that as a matter of law such reliance on the constitutional provisions cannot be made the basis of any disciplinary action by this court.

Our view, as previously stated, is that a lawyer, like any other citizen, has an absolute right to invoke his constitutional privilege against self-incrimination and to refuse to supply the pertinent information; but that when a lawyer does so he fails in his inherent duty to the court to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar and necessary to the proper administration of justice, and he must, consequently, forfeit his privilege of remaining a member of the bar (Matter of Cohen v. Hurley, 9 A D 2d 436, affd. 7 N Y 2d 488, affd. 366 U. S. 117, rehearing denied 374 U. S. 857, 379 U. S. 870). As we stated in Cohen (pp. 448-449):

> "To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar."

In our opinion, the doctrine which we enunciated in *Cohen* has been in no way undermined or impaired by any contrary holding in the subsequent case of Malloy v. Hogan (378 U. S. 1), as urged by respondent. In that case, the petitioner had been held in contempt and imprisoned in consequence of his refusal to answer questions on the ground that his testimony would tend to incriminate him. But the petitioner there was not a member of the bar and,

of course, his right to retain his membership in the bar, despite his refusal, was in no way involved.

Under the circumstances, this court has no alternative other than to disbar the respondent. If he elects to invoke his constitutional privilege against self incrimination and thus avoid exposure to criminal prosecution—an election which undoubtedly is his to make—he cannot at the same time retain his privilege of membership at the bar. To that doctrine this court must adhere.

Accordingly, the petitioner's motion to confirm the Referee's report is granted; the Referee's findings are confirmed; and, on the basis of his unchallenged finding that respondent refused to testify and to produce his records, the respondent is disbarred and his name directed to be struck from the roll of attorneys and counselors at law in the State of New York, effective October 1, 1965.

CHRIST, Acting P.J., BRENNAN, HILL, HOPKINS and BENJAMIN, JJ., concur.

July 19, 1965.

APPENDIX C

Copy of Minute furnished by Clerk of the Court of Appeals of the State of New York:

2. No. 459 65

In the Matter of SAMUEL SPEVACK, an Attorney.

SOLOMON A. KLEIN, *Respondent*,

SAMUEL SPEVACK, *Appellant*.

Order affirmed on the authority of *Cohen* v. *Hurley* (366 U.S. 117) and on the further ground that the Fifth Amendment privilege does not apply to a demand, not for oral testimony but that an attorney produce records required by law to be kept by him (*Davis* v. *United States*, 328 U.S. 482; *Shapiro* v. *United States* (335 U.S. 1). No opinion. All concur, Fuld, J. in the following memorandum: Although I still adhere to the views I expressed in dissent in Matter of Cohen, (7 N.Y. 2d 489, affd. sub nom *Cohen* v. *Hurley*, 366 U.S. 117), I deem myself concluded by that decision and, accordingly, concur for affirmance. (But cf. *Malloy* v. *Hogan*, 378 U.S. 1).

APPENDIX D

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of January A. D. 1966.

Present, Hon. CHARLES S. DESMOND, Chief Judge, presiding.

2 Mo. No. 27

In the Matter of SAMUEL SPEVACK, an Attorney,

SOLOMON A. KLEIN, *Respondent*,

SAMUEL SPEVACK, *Appellant*.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, vis: Appellant contended that his disbarment, based upon his refusal to produce any of the records specified in the subpoena duces tecum, duly issued in a judicial inquiry into professional conduct, and based upon his prior refusal to answer any questions which might be asked relating thereto, violated his constitutional privilege against self-incrimination and his constitutional right to due process of law. The Court of Appeals held there was no violation of any of the appellant's constitutional rights.

And the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

[Seal.]

Grabon Kimball,
Deputy Clerk.

APPENDIX B

United States Constitution, Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

United States, Constitution, Amendment XIV

Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department

* * * * * * *

RULE V

Preservation of Records of Actions, Claims and Proceedings. In every action, claim and proceeding of the nature described in rule three, attorneys for all the parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontinuance of any action or proceeding brought.

APPENDIX F

(R. 118-19)

Q. Mr. Spevack, I ask you at this time if you will, pursuant to the subpoena of June 2, 1958, produce the day book requested therein. Just to speed the process, if your answer is the same, with permission of the Court, would you say the same?

A. Yes.

Q. Is your answer the same?

A. It is.

Q. Would you produce, pursuant to that subpoena, cash receipts book?

A. The answer is the same.

Q. Cash disbursements book?

A. The answer is the same.

Q. Check book stubs?

A. The answer is the same.

Q. Petty cash book?

A. The answer is the same.

Q. Petty cash vouchers?

A. The answer is the same.

Q. General ledger and general journal?

A. The answer is the same.

Q. Canceled checks, bank statements, duplicate deposition slips of regular and checking accounts, open and closed?

A. The answer is the same.

Q. Passbooks and evidence of accounts other than checking accounts, with all depositories, such as savings banks, savings and loan associations, postal savings, credit unions, etc.?

A. The answer is the same.

Q. Record of all loans made from financial institutions and others, open and closed?

A. The answer is the same.

Q. Payroll records consisting of: (A) Payroll book, (B) Social Security and withholding tax returns?

A. The answer is the same.

Q. Copies of Federal and State income tax returns and accountant's work sheets relative thereto?

A. The answer is the same.

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